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THE GENESIS OF A WRITTEN CONSTITUTION.

THE admirers of the British Constitution are accustomed to call attention to what they regard as its two great merits, its permanence and its pliability. And these superior merits are often attributed to the fact that it is an unwritten constitution. Resting upon immemorial custom, it is closely related to the life and thought of the people, it has expanded with the growth of society, and therefore reflects the permanence and progress of the nation.

It cannot be doubted that the close affiliation existing between the organic law and the historical life of any country is the one fundamental condition which insures the endurance and flexibility of that law. Indeed, the constitution can hardly be regarded in any proper sense as the organic law, unless it be a true expression of the organic life of a people. No unbiased student of political history is disposed to ignore the great merits which are

attributed to the English Constitution, due to the fact that it is the result of growth, and not of manufacture. The history of the fiat-constitutions of France illustrates the pitiful failures of organic law made to order; and the unhappy experiences of the many South American republics, whose constitutions have been patterned after that of the United States, show that a successful form of government cannot be introduced into a country by mere importation, especially if it find no support in the political habits and character of the people.

Admitting that the permanence of a constitution is dependent upon the laws of historical growth, that no political forms created to meet a temporary emergency or framed by a mere act of arbitrary volition are likely to endure, it becomes an interesting question to an American citizen whether the laws of historical development apply only to an unwritten constitution. The organic law under which he lives is set forth in a written document. It was put into form at a given time and place. It was fashioned in the heat of discussion by a chosen body of men, whose work in its outlines and its details he is accustomed to think was solely the product of their creative wisdom. This idea was formerly so prevalent that the apotheosis of the Fathers occupies a large place in American political literature; and this view is not confined to native writers. The flattering sentiment of Mr. Gladstone has often been quoted, "As the British Constitution is the most subtile organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." And this quotation is approvingly used by Mr. Bancroft as a sort of dedicatory preface of his *History of the Constitution.* The German writer, von Holst, with greater historical insight, is inclined to satirize the worship of the Constitution and the Fathers, but the scope of his own work does not permit him to discuss the real origin of American constitutional law. It may, indeed, perhaps

be a question whether the more recent views regarding the growth of the Constitution need destroy our veneration for this document, or detract from our esteem of those who gathered the materials of which it is composed. We may see that there were abundant reasons why, from the earliest history of our country, Americans have been led to attribute a kind of sanctity to the written documents by which only their rights could be secured. We may also see that the framers of the Constitution, though they created scarcely any new political forms, yet used the forms already existing to meet the needs of an expanding national life.

The crude notion to which reference has been made, that the frame of government embodied in the Federal Constitution was struck off at a given time by the brain and purpose of a particular set of men—a notion once common enough—has now scarcely any advocates among those who have ventured to investigate its sources. In the place of this notion, however, there has been substituted by certain writers a somewhat more historical view—a view which, no doubt, bears some marks of reason and plausibility. It is said that the Federal Constitution was modelled directly after the English Constitution: it was an adjustment of English forms to American wants. The American president is the English monarch made elective. The American Senate is the House of Lords shorn of its aristocratic privileges. The House of Representatives is a translation of the House of Commons. The members of the convention of 1787 were themselves, in great part Englishmen, and it was but natural that they should, in forming a new government, make a direct copy, so far as the circumstances would permit, of the existing constitution of the mother country. A recent English writer says, "The American constitution of 1789 was a faithful copy, so far as it was possible to make one out of the materials at hand, of the contemporary constitution of England."[1] If this English

[1] Encyclopedia Britannica, 9th ed., Art. "Constitution."

writer had taken the trouble to study the previous governments of the different states, all of which had written constitutions several years before the Federal Convention was called, he might have been surprised to find that each of these constitutions might just as well be considered a faithful copy of the contemporary constitution of England. The presidents and governors of the states, the state senates and legislative councils, the houses of representatives and deputies, might with the same aptness be regarded as imitations of the English King, Lords, and Commons. If he had gone still further and examined the governments of the several colonies, all of which, from the earliest times, were supported by written legal documents, he might have seen in each of them also quite as faithful a copy of the contemporary constitution of England. The fact is, that the adaptation of the political institutions of England to the wants of the English people in America did not begin at the close of the eighteenth century and with the work of the convention of 1787. It began nearly two hundred years before with the earliest migration of Englishmen to American shores, and continued through all the succession of political vicissitudes in which the American colonists saw that their persons and property could be protected only by appealing to the constitutional rights of Englishmen. Indeed, the perpetual influence of English institutions is one of the marked features in the growth of the American nation. But it must be observed that the direct influence of the English Constitution, even in the colonial period, is seen not so much in the frame of government which came to be adopted, as in the legal guarantees by which the colonists sought to be fortified in their right to be tried by the forms of the common law, and to be protected from the arbitrary conduct of their governors, when these governors were not of their own appointment. These statements are, perhaps, sufficient for the present to show that the American constitution of 1787 was not a mere copy of the

contemporary constitution of England. So far as it possesses elements of English origin, it derived these elements not from the contemporary institutions of Great Britain, but from the antecedent institutions of the states and colonies, in which in the long process of time these English elements had already become adjusted to American needs and conditions. In other words, the American constitution is not a codification of the customary constitutional law of England. Although its roots may reach far back into English and Anglo-Saxon soil, it has a distinctive character of its own, and a distinctive history of its own.

In order to prepare the way still further for the proposition to be set forth in this article, it is necessary to say that the Federal Constitution is not only not a fiat-constitution projected from the brain of the Fathers, nor a copy of the contemporary constitution of England; it is also not founded upon any previous body of institutions which existed merely in the form of customs. As it is itself primarily a body of written law, so it is based upon successive strata of written constitutional law. One of the most distinctive and marked features of American constitutional history is the fact that the political institutions of this country have grown up within what may be called the "area of written law." The general outlines of the frame of American governments and the general guarantees of civil and political liberty have been defined almost invariably by express statutory enactments; and these have usually taken the form, not of isolated and fragmentary acts, but of single written documents. The emphasis which is here given to the written character of the American constitutions is made with full appreciation of the statements set forth by certain writers regarding what has been called the *unwritten* Constitution of the United States, in which reference is made to such facts as the decay of the electoral college, the changes of the law through judicial interpretation, etc. But it may be a question whether the modified use of a legal form itself estab-

lished by express enactment, or any new interpretation of the meaning of a legal enactment can properly come within the definition of "unwritten law," as that term is used either by the civil or by the common lawyers. Without, however, quibbling about the definition of a phrase, the fact remains that the Constitution of the United States is primarily a written constitution; and the proposition which I wish to illustrate is that the general frame of government established by the Constitution and the general guarantee of rights contained in it, are themselves the result of historical growth through a series of written constitutions. The phrase "written constitution" is here used to denote any positive organic law, or body of statutory provisions established by a competent political authority defining the powers and branches of government and securing the political and civil rights of the subject.

Only one American writer and one English writer, so far as I am aware, have furnished the clue by which to trace what I conceive to be the true genesis of the Federal Constitution of the United States. The late Prof. Alexander Johnston showed by an abundance of material how nearly all the elements of the Federal Constitution were derived from the existing written constitutions of the states;[1] and Prof. Bryce, in a single sentence of his *American Commonwealth*, has indicated the true origin of the written constitutions of the states themselves. He says: "The State Constitutions are the oldest things in the political history of America, for they are the continuations and representations of the royal colonial charters, whereby the earliest English settlements in America were created, and under which their earliest local governments were established." He illustrates this statement by a reference to

[1] New Princeton Review, September, 1887. Since the present article was written, there has appeared in this journal (October, 1890) a paper entitled, "The Original and Derived Features of the Constitution," by James Harvey Robinson, setting forth in a clear manner the indebtedness of the Federal Constitution to the state constitutions.

the history of the Massachusetts charter.[1] The statements of these two writers suggest the proper steps to be followed in tracing the historical growth of American constitutional law. To describe in full this line of development, it would be necessary to consider: First, how the charters of the colonial trading companies furnished the type of the written constitutions of the colonies; secondly, how the written constitutions of the colonies were transformed into the written constitutions of the thirteen original states; and, thirdly, how the written constitutions of the states contributed to the written constitution of the Federal Union. It is the first of these steps only which I shall be able to illustrate as fully as I desire in this article. In other words, I wish to show how the forms of government established by royal charters for the English trading companies furnished the type upon which the original colonial constitutions were framed, and also how these constitutions came to be embodied in written law.

As a part of the general colonizing movement which characterized the history of Western Europe during the sixteenth and seventeenth centuries, and as a result of the repeated failures of individual adventurers, who, under the authority of letters-patent, had attempted to make settlements in the newly-discovered lands, it became the settled policy of the colonizing nations—especially France, Holland, Sweden, and England—to incorporate trading companies with capital and powers sufficient to carry on with greater prospect of success commercial enterprises. It would carry us too far from our subject to trace, or more than to suggest, the relation of these companies to the previous trade corporations and chartered guilds of the Middle Ages. The point that concerns us here is the nature of the constitution, or organic law, of these companies as established by their written charters.

The English East India Company may be taken as

[1] American Commonwealth, I. 413–415.

furnishing the best general type of the organic law of these bodies. This company was chartered by Queen Elizabeth on the 31st of December, 1600, "to be," in the words of the charter, "one body politic and corporate, by the name of the *Governor and Company of Merchants of London trading to the East Indies.*" The organization of the company, as defined by the terms of the charter, was as follows: It was to have a governor, a deputy-governor, and a committee or council of twenty-four persons. The first governor was designated in the charter. The subsequent governor and all the other officers were to be chosen in a general court or assembly of the whole company. Every member, before being admitted, was required to take an oath "to traffic as a freeman of the company." The governor, or, in his stead, the deputy-governor, was required to preside over the general assembly, which consisted of the governor, the council, and the members of the corporation sitting as one body. This assembly was authorized "to make all reasonable laws, constitutions, etc., agreeable to the laws of England, for their good government, by a plurality of voices"; and also "to punish by fines and imprisonment the offenders against these laws."[1] The company was, in short, a body-politic, democratic in its organization, exercising its functions through a governor and deputy, a council, and an assembly of all the members of the corporation. These branches of government might, by a stretch of fancy, be supposed to be patterned after the English King, Lords, and Commons. But it might easily be shown that this form of corporate organization reaches back in England, and also on the Continent, to a time long before the English House of Commons was formed.

The franchise of the East India Company was, of course, restricted to the trade with the Asiatic coasts. The whole American coast had at this time no permanent English

[1] Anderson's Origin of Commerce, II. 196. (Lond., 1787.)

settlement. For the purpose of bringing this country under the commercial dominion of England, James I., in 1606, granted the first charter of Virginia. This charter, with its subsequent modifications, may be said to form the beginning of the constitutional history of the United States. It was born amid the fierce struggle then going on between the king, who was claiming his divine right, and the people, who were claiming their constitutional privileges; and the history of this charter bears the plain marks of this struggle. King James, in his blind devotion to his autocratic theory, attempted at first to limit the right of self-government, which had usually been bestowed upon a corporation, and to keep in his own hands the full control of the new colonies about to be established in America. Hence, we find the first charter of Virginia entirely divested of the democratic features which characterized the normal type of the corporation as embodied in the East India charter.

The significant features of the first Virginia charter, granted in 1606, will be evident from the following brief description: It divided the whole American coast to which the English laid claim into two parts, which were respectively granted to two related companies—the southern part being conferred upon what was called the first, or London Company, and the northern part upon the second, or Plymouth Company. This division was the origin of the separate history of the Southern and the New England colonies. Each colony was to be governed by a local council resident in the colony, appointed[1] and removable by the king, and to govern according to royal instructions. These local councils, in turn, were to be subject to a superior council resident in England, also appointed by the king and under royal instructions. Notwithstanding

[1] Historians are not agreed as to the mode of appointment. The words of the charter are: "Each of which councils shall consist of thirteen persons to be ordained, made, and removed from time to time, according as shall be directed and comprised in the same [royal] instructions."

these autocratic features, it is worthy of note that this first American charter contains a general guarantee of civil rights, which the colonists ever after claimed as their legitimate heritage. It explicitly provided "that each and every the persons being our subjects, which shall dwell and inhabit within every and any of the said colonies and plantations, and every of their children which happen to be born in any of the limits and precincts of the several colonies and plantations, shall have and enjoy all liberties, franchises, and immunities within any of our other dominions as if they had been abiding and born in this our realm of England."[1] With this charter as a starting-point, we may trace the two diverging lines of development which mark the constitutional genesis of Virginia and the Southern colonies on the one hand, and that of Massachusetts and the New England colonies on the other.

The history of the Southern colonies, and of Virginia in particular, begins with the operations of the London Company under this grant. The grant contained, as has been said, no democratic features, and furnished no basis for any political organization among the colonists themselves, who were governed by the local council appointed by the king. The threatened failure of the little settlement at Jamestown under this regime, led in 1609 to a revision of the charter by the king, whereby the London Company received a distinct corporate name as the *Treasurer and Company of Adventurers and Planters of the City of London for the First Colony of Virginia.* Its powers were made more ample, and its constitution contained some concessions of a democratic stamp. It was organized under a council, together with a treasurer who was to act as the chief executive officer of the company. The first treasurer and council were named in the charter, which provided, however, that all vacancies should be supplied "out of the

[1] For the charter, cf. Poore's Charters and Constitutions, II. 1888.

company of said adventurers by the voice of the greater part of said company of adventurers, in their assembly for that purpose." The council, presided over by the treasurer or his deputy, was to appoint all officers, "to make, order, and establish all manner of laws, directions, instructions, forms, and ceremonies of government and magistracy, fit and necessary for and concerning the government of the said colony and plantation." By this second charter the company acquired the distinct character of a body-politic, with administrative and legislative functions in the hands of the council and treasurer, and elective functions in the hands of the assembly. But the rights of self-government, which the king by this charter yielded to the company, the company in its turn did not yield to the colonists. The local council, which had been established by the previous charter, was superseded by a single governor, appointed by the company, who was given exclusive supervision of local affairs.[1]

The second charter, just described, is chiefly significant as a step leading to the third and most important charter of Virginia, granted in 1612. The granting of this charter illustrates the growing influence of the popular movement in England against the autocratic policy of James I. It seems to be an advance upon any previous grant bestowed by that misguided monarch; but it was, in fact, merely a restoration of the normal democratic features of the corporation, such as were already embodied in the constitution of the East India Company, and were derived from the traditional rights of self-government possessed by chartered companies from the earliest times. The written constitution granted to the London Company by the charter of 1612, is so important in its bearing upon the early political history of Virginia and the other colonies, that I shall indicate its provisions as nearly as possible in the words of the charter itself. After providing for a

[1] For the charter, cf. Poore's Charters and Constitutions, II. 1893.

council of twenty-four persons (of which the chief executive or his deputy shall be the presiding member), it declares that the council shall be "a sufficient *court* of the said company for the handling, ordering, and dispatching of such causes and particular occurrences and accidental matters of less consequence and weight as shall from time to time happen touching and concerning the said plantation; and that, nevertheless, for the handling, ordering, and disposing of matters and affairs of greater weight and importance, and such as shall or may, in any sort, concern the weal public, and general good of said company and plantation, as namely, the manner of government from time to time to be used, the ordering and disposing of the land and possessions, and the settling and establishing a trade there, or such like, there shall be held and kept every year upon the last Wednesday save one of Hillary term, Easter, Trinity, and Michaelmas terms, forever, one great, general and solemn assembly, which four assemblies shall be called *The Four Great and General Courts of the Council and Company of Adventurers of Virginia.*" This assembly, thus composed of the executive, the council, and members of the company, sitting as one body, was authorized "to elect and choose discreet persons to be of our said council for the first colony of Virginia, and to nominate and appoint such officers as they shall think fit and requisite for the government, ordering, and dispatching of the affairs of said company;" also "to ordain and make such laws and ordinances for the good and welfare of the said plantation as to them from time to time shall be thought requisite and meet; so, also, as the same shall not be contrary to the laws and statutes of this our realm of England." Power was also given to the assembly to admit persons to the freedom of the corporation. Certain judicial powers were also given to the chief executive and the council. After an enumeration of the commercial rights granted to the company, the charter closes with a confirmation of all previous liberties and franchises conferred

upon the inhabitants of the colony. This third charter of Virginia thus erected the London Trading Company into a body-politic, democratic in its organization, with powers vested in a chief executive, a council, and an assembly, having full authority to legislate and to establish a form of government for the colony confided to its care.[1]

The charter just described possessed all the essential elements of a written constitution. It established a frame of government and distributed executive, judicial, and legislative functions. It was, however, merely the constitution of an English trading company. It is necessary to show how this corporate constitution furnished the type of the colonial constitution of Virginia. The kind of privileges which the company had now obtained from the king, and which served to give new life and hope to their own members, the company were not slow to perceive might afford similar benefits to the struggling colonists, with whose interests their own were closely allied. They had themselves learned the repressive effects of an autocratic policy. Their own colonists were now under the control of a single governor, who exercised an almost military power, and whose arbitrary rule occasioned many complaints on the part of his subjects. The exceptional tyranny of one Argall induced the company to establish in the colony a council, which like their own council should act as an advisory body to the governor. But the chief step which gave to the colonial government the same general form as that possessed by the company was due to the instructions given to Governor Yeardley to call a general assembly of the colonists that they might have a share in the legislation of the colony and be given an opportunity to make petitions to the company. As the colonists were now scattered over eleven plantations, the inconvenience of their meeting together in one place led to the adoption of the plan whereby they should appear

[1] Poore's Charters and Constitutions, II. 1902.

by deputies. All the freemen shared in this first election of deputies, and two burgesses were returned from each plantation. Thus was constituted at Jamestown, in 1619, the first representative assembly that ever met on American soil.

In order to give a definite and written sanction to the political changes which had thus been introduced, the London Company issued the famous ordinance of 1621, which contained a clear definition of the powers and branches of the colonial government. All political authority within the colony was vested in a governor and a council of assistants (appointed by the company), and a body of burgesses composed of two delegates from each plantation—the whole to constitute the general assembly of the colony for the purposes of legislation. At first the governor, the council, and representatives, after the fashion of the company's government, met together in a single body. This assembly was empowered to consult regarding the public weal and to enact general laws. But in order to preserve the superior control of the company, a negative voice was reserved to the governor, and no enactment of the assembly was to be of force unless ratified by the general court of the company in England. On the other hand, it was generously provided that no order of the general court was to bind the colony unless assented to by its assembly. After the pattern of the company's government, the governor and council in the colony were empowered to act as a court of justice and to hold quarterly sessions. The common law of England was considered to be in force in the colony, and trial by jury was assured. This important enactment, bearing the date of 1621, was the first written constitution granted to an American colony, and was ever afterward regarded by the colonists of Virginia as the legal foundation of their political rights.

It will be seen that all the essential features of this constitution were a reproduction of the constitution of the

London Company and of its prototype, the East India Company, namely: (1) The three elements of the government—the chief executive, the council, and the assembly; (2) the administrative and judicial functions of the governor and council; and (3) the legislative functions of the governor, council, and freemen united in a single body. The only important modifications—namely, the introduction of deputies and the granting of the veto power to the governor—were clearly the direct result of the peculiar circumstances in which the colony was placed; the one due simply to convenience, and the other to the desire on the part of the company to preserve as far as possible its control over the legal acts of the colony. Some historians are strangely inclined to regard the Virginia constitution of 1621 as consciously modelled after that of the English government. The difficulties of this view are: first, the fact that its resemblances to the English government are extremely remote, while its resemblances to the government of the company are extremely close; and, secondly and chiefly, the fact that the steps of its formation show that the colony was regarded as an offshoot of the company, with common interests, and could be most efficiently organized by having transferred to it similar political powers and privileges. With a more just appreciation of the facts in the case, Mr. Chalmers, after mentioning the provisions of the ordinance, says: "Thus we trace to a commercial company those free systems of provincial government that have distinguished the English colonies above all others for their regard for the rights of men. In this famous ordinance," he continues, "we behold the model from which every future provincial form was copied, though varied by difference of circumstance."[1]

This account of the origin of the Virginia constitution has been given in some detail because it furnishes the first

[1] Chalmer's Intro. to the Hist. of the American Colonies, I. 16, 17. This ordinance is found in Stith's Virginia, Appendix No. 15, and in Hazard's Coll., I. 133–135.

example of an American government constituted by written law, and because its early history is necessarily somewhat complicated on account of the successive changes made in the charter of the London Company. The general frame of government established by the ordinance of 1621 continued throughout the subsequent history of the colony. It was not overthrown at the dissolution of the London Company in 1624. When Virginia was changed into a royal colony the general supervision which had been exercised by the company was assumed by the king; but the governmental forms remained substantially the same, although modified in detail sometimes by royal instructions, but generally by the legislation of the people themselves.

Virginia may properly be regarded as the parent of the other colonies of the South. Upon the territory granted to the London Company were afterward erected the colonies of Maryland and the Carolinas; and the form of government sanctioned by the ordinance of 1621 became the type upon which that of the other colonies was modelled. While the colony of Virginia grew up under the charter granted to a trading company, and its constitution was defined by an ordinance of that company, the other southern colonies grew up under charters granted to proprietors, and their constitutions were established by the ordinances of these proprietors, or by popular legislation. The point to be emphasized here is the fact that the constitution of the proprietary colonies, notwithstanding their different sources, became assimilated in form to that of Virginia, and in a similar way became sanctioned by written law.

The growth of written constitutions under proprietary grants may be illustrated from the history of Maryland, the first colony to be erected under such a grant. The basis of all political power and privilege in the colony was, of course, the royal charter granted to Lord Baltimore in 1632. The charter made the grantee and his

heirs "true and absolute lords and proprietors" of the province, with all the rights pertaining to a count palatine. With reference to the power of legislation the charter granted to the proprietor "the full, free, and absolute power . . . . to ordain, make, and enact laws, of what kind soever, according to their sound discretions, whether relating to the public state of said province, or to the private utility of individuals, of and with the advice, assent, and approbation of the freemen of the same province, or of the greater part of them, or of their deputies or delegates, whom we will shall be called together for the framing of laws, when and as often as need shall require." It also authorized the appointment of all necessary officers and the constitution of all necessary courts, without, however, designating the name or number either of the officers or of the courts. Supplementary to the general powers of legislation just referred to, the charter empowered the proprietor to issue ordinances in times of emergency when the freemen could not be called together.[1]

The first constitution of the colonial government under this charter was framed by the ordinance issued by the proprietor in 1637, whereby the political organization of Maryland became closely modelled after that of Virginia. It comprised a governor (under the name of lieutenant-general), a council, and an assembly. The chief executive power, civil and military, was vested in the governor. The judicial power was granted to the governor and his council, and the ultimate power of legislation was recognized as belonging to the assembly of freemen, or their deputies.[2]

The more specific definition of the branches and powers of the government, and of the civil rights of the subject, was made by a body of constitutional enactments passed

[1] For this charter, cf. Poore's Charters, I. 811; a translation will be found in Bozman's History of Maryland, II. 9.

[2] This ordinance is given entire in Bozman, II.; App. note 6.

by the assembly of 1639. Previous to this time two assemblies had met, but they were occupied chiefly in a dispute with the governor as to the right of initiating legislation, which right was finally conceded to the assembly. The legislation of 1639 gave a definite form to the colonial constitution of Maryland.[1] To enumerate briefly its chief provisions, it secured the rights of the holy church; the supremacy of the king by requiring an oath of allegiance; the territorial rights of the lord proprietor; the rights and liberties of the inhabitants according to the great charter of England; the regulation of the judiciary; the probate of wills; the military defence of the province; and the definite organization of the assembly. The organization of the early assemblies of Maryland affords a good illustration of the way in which a primary assembly is sometimes changed into a representative body. The original charter granted a share in legislation to the freemen, or to the greater part of them, or to their deputies—with no indication as to which method was to be preferred. The problem was left to be worked out by the colonists themselves. It is said that the first assembly was made up of all the freemen, which was possible on account of the small area then settled. The second assembly was composed not only of freemen sitting in their own right, but also of proxies who appeared for absent freemen; and the same person might appear both for himself and as a proxy for others. We, consequently, find in this second assembly different persons having a different number of votes—the number varying from four to fifty-six. The inexpediency of this method led to the definite organization of the assembly by the legislation of 1639 just referred to. Each hundred (St. Mary's, St. Michael's, St. George's and Conception *alias* Mattapanient) was required to send one or two burgesses to sit with the governor and the council, who together constituted the general assembly of the prov-

[1] Bozman, II. ch. 2, and App., note 21; Assembly Proceedings of Maryland from 1637 to 1658, p. 129; Bacon's Laws of Maryland, under 1638–9.

ince. In this way the colony of Maryland speedily reached the same form which Virginia, on account of the scattered condition of her population, had found it convenient to introduce into her first assembly. In their early history these two colonies were intimately connected with each other, and Bozman says, "The customs of Virginia were closely copied by the colonists of Maryland."[1]

These few statements must suffice to show how the constitution of Maryland became assimilated to that of Virginia, but especially how this constitution was established by a succession of written laws, namely: (1) The original charter of the proprietor granted in 1632; (2) the ordinance of 1637; and (3) the constitutional legislation of 1639. This constitution remained substantially the constitution of Maryland during the whole colonial period. In its expansion it, of course, took on supplementary provisions, sometimes suggested by the colonists themselves, sometimes borrowed from their neighbors in Virginia, and sometimes adapted from the customs of England, the latter adaptations relating for the most part to the use of the common law in judicial proceedings.

The constitutional development of the other colonies in the South followed, in the main, the same method of growth as that described with reference to Maryland. The only point of interest that need be mentioned here is the effort which was made on the part of the proprietors of Carolina to introduce into that province that elaborate piece of legislative ingenuity called the "Fundamental Constitutions," drawn up by the English philosopher, John Locke.[2] This is one of the most instructive examples which history affords of what may be called a fiat-constitution. It was devised by a great and good man; but it was evidently made with little knowledge of the actual condition of the colony and with no reference to its prac-

[1] Bozman, I. 49.

[2] Poore's Charters, II. 1397. This document contains one hundred and twenty enumerated provisions.

tical needs. It was created out of nothing, and it soon relapsed into nothing. After a feeble attempt on the part of the proprietors to palm off upon the colonists this device of their philosophical friend, there was established in its place a simple form of government, with a governor, council, and assembly, similar to that which their neighbors in Virginia and Maryland had found suited to their circumstances.

These illustrations are, doubtless, sufficient to show that the form of government which prevailed in the southern colonies was modelled after that of the parent colony of Virginia, which, in turn, was derived from the form of government established by royal charter for the London Trading Company; and also that the constitutions of the southern colonies came into being, not as the result of mere custom, but as the product of statutory legislation.

As we turn to New England we shall see that the typical government of the Northern colonies was not patterned after that of a trading company. It was itself the government of a trading company. In the case of Virginia, the company sent out the colony and established a government over it. In the case of Massachusetts, the company became the colony, and brought its government with it. To coördinate properly the colonial constitutions of New England with those of the South, we must go back to the general charter of 1606, that is, the first charter of Virginia, which provided for the colonization of both sections, and constituted precisely the same form of local government for each. Circumstances similar to those which led in the South to the second charter of Virginia and the incorporation of the London Company as a distinct body-politic with enlarged powers, also led in New England to the granting of a second charter, namely, that of 1620, whereby the Plymouth Company was organized as a distinct corporation with similarly enlarged powers.[1] This

[1] Poore's Charters, I. 921.

second Plymouth Company, which is known as the "Council of Plymouth for New England," did very little in the actual work of colonization, but was profuse in subgranting its territory to any who might desire it. The coast bordering upon Massachusetts Bay was granted by the Council of Plymouth to an unincorporated body of English Puritans, who, after some feeble attempts at settlement, soon desired their title confirmed and their body erected into a distinct corporation by a direct grant from the king. This led in 1628 to the granting of a new charter, whereby the "Governor and Company of Massachusetts Bay in New England" became a body-politic and corporate.

The Massachusetts charter, which was the third royal charter for New England, corresponds precisely to the third charter of Virginia, granted in 1611, and the government constituted for the company was in all essential respects the same in both. The Massachusetts charter creates a frame of government, consisting of "one governor, a deputy-governor, and eighteen assistants of the same company, to be from time to time constituted, elected, and chosen out of the freemen of said company." It also provides, in almost the same language as that of the third Virginia charter, for the holding of "four great and general courts of the company" each year. It furthermore declares that, in the general court, "the governor or deputy-governor, and such of the assistants and freemen of the company as shall be present, shall have full power and authority to choose other persons to be free of the company, and to elect and constitute such officers as they shall think fit for managing the affairs of said governor and company, and to make laws and ordinances for the good and welfare of the said company, and for the government and ordering of said lands and plantation, and the people inhabiting or to inhabit the same, so as such laws and ordinances be not repugnant to the laws and statutes of this our realm of England."[1]

[1] Massachusetts Records, Vol. I. 3; also Poore's Charters, I. 932.

The constitution of the Massachusetts Bay Company was thus substantially identical with that of the London Company under its third charter, and, consequently, the same form of government became the political type for the colonies, both in the South and in New England. The London Company, it is true, had remained in England, and had organized a colonial government in Virginia similar to its own. The Massachusetts Bay Company, on the other hand, elected officers from those persons who were willing to emigrate to America, and the officers and all the members of the company who were able were transported, with their charter, to the shores of New England. What was originally organized as an English trading company thus became an American colony, with its constitution and government unchanged. The charter of 1628 remained the colonial constitution of Massachusetts until 1691, when it was superseded by a new royal charter, which, however, confirmed the previous frame of government in all its essential points, with the exception that the governor was now to be appointed by the crown.[1] It should also be noticed that by this charter of 1691 the colony of pilgrims at Plymouth, Massachusetts, who had developed an independent government of their own, without any royal sanction, was united to Massachusetts Bay, and became incorporated into the same political organization.

The other constitutions of New England, the origin of which needs to be briefly noticed, are those of Connecticut and Rhode Island. New Hampshire was so closely related to Massachusetts during the colonial period that it requires no special mention in this rapid review. The origin of the Connecticut colony was due to the migration of a few of the freemen of Massachusetts to the Connecticut River, where they formed the settlements of Windsor, Hartford, and Wethersfield. Being freemen of Massachusetts, they were at first regarded as under the jurisdiction of that

[1] Poore's Charters, I. 942.

colony, and were governed by commissioners appointed by the Massachusetts court, which commissioners were given administrative and judicial powers, and were authorized, if occasion required, to call a court of all the inhabitants of the Connecticut towns.[1] The failure to renew this commission after the first year compelled the neglected colonists to govern themselves, which they did by calling in their own name a court of all the inhabitants. In order to give a definite form to the independent government which they were thus compelled to assume, they enacted in their general court in 1639, what was called the "Fundamental Orders," which constituted a frame of government, in all essential respects, similar to that which they had left behind them in Massachusetts, with its governor, council of magistrates, and general court, having functions similar to those of the corresponding branches in the parent colony.[2] This enactment of the Connecticut colonists has been extolled as "the first example in history of a written constitution—an organic law constituting a government and defining its powers."[3] Mr. Bryce calls it "the oldest truly political constitution in America."[4] It was, no doubt, the first written constitution which was enacted by the independent authority of the people. The form of government, however, which it constituted was simply a reproduction of that of the Massachusetts Bay Company sanctioned by the charter of 1628. Whether the independent authority exercised by the Connecticut colonists was alone sufficient to constitute a legal government was to them, at least, a matter of question. Aware of the doubtful nature of their title to exercise sovereignty, the colonists appealed to the king, and in 1662 received a royal charter, which erected the colony into a corporate company, with powers and privileges similar to those already given the Massachusetts

[1] For the commission, cf. Massachusetts Records, I. 170.
[2] Poore's Charters, I. 249.
[3] Bacon's Constitutional History of Connecticut, 5, 6.
[4] American Commonwealth, I. 414, note.

Bay Company.[1] The phraseology of this charter throughout is almost precisely the same as that employed in the Massachusetts charter of 1628, which was intended to confer a commercial and political franchise upon a trading company. Judged from the technical phraseology of the charter, the colony of Connecticut, like that of Massachusetts, was viewed strictly in the light of a trading company. In the case of Massachusetts the company was erected upon British soil and transported to New England; in the case of Connecticut the company was erected in the first instance upon New England soil. By the charter of 1662, it should also be noticed, the colony of New Haven, after maintaining a feeble existence under a voluntary government, became united to that of Connecticut, and became organized under the same political constitution.

The description which has been given regarding the origin of governmental forms in Connecticut applies, with few modifications, to Rhode Island. Rhode Island, like Connecticut, was a double colony. Its two constituent parts were at first organized by voluntary associations of the settlers, and finally united under the charter of 1663.[2] With the exception of a special guarantee with respect to religious liberty, this charter employed the precise terms already used in the Connecticut charter as regards the political organization of the colony, and in the same way the colony is viewed primarily as a trading company with commercial rights, the political authority being an incidental element of the general corporate franchise. As in the case of Connecticut, the government of Rhode Island was framed upon the Massachusetts model, with a governor and deputy, a council of assistants, and a general court or assembly, with similar provisions regarding the organization and powers of these branches. It should be mentioned as a qualification of this statement, that the custom of representation which had grown up in Massachusetts since

[1] Poore's Charters, I. 252.

[2] Poore's Charters, II. 1595.

its first charter was given, and which had become adopted in the other New England colonies, was expressly recognized by the charters of Connecticut and Rhode Island, and was only formally sanctioned in Massachusetts in the subsequent charter of 1691.

Thus, in all the colonies in New England, as in those of the South, there were established by the English sovereign, who alone possessed the supreme legal authority over the territory and inhabitants, constitutions embodied in written law, which defined the branches and functions of the government and guaranteed political and civil rights on the part of the subjects; and the forms of government thus sanctioned were genetically related to those already existing in the trading company.

The space remaining will not be sufficient to make more than a few summary statements regarding the origin of the constitutions established in the middle English colonies which were erected on the territory granted to the Duke of York in 1664. The general type of the colonial government had then become so well defined, both in the South and in New England, that it was readily adopted in the middle colonies with no essential modifications.

The facts which mark the growth of the colonial constitution of New York are: (1) The grant which was made to the Duke of York in 1664, and renewed in 1674, which gave to the proprietor full authority to make laws for the colony;[1] (2) the ordinance of the Duke of York, issued in 1682, authorizing the governor to call an assembly, which was granted power to make laws for the general regulation of the state;[2] and (3) the constitutional enactments of 1683, made by the first New York assembly, which was formally called by the governor, as the duke's representative, in answer to a popular petition for a government like that of the New England colonies. These enactments, under the

[1] Poore's Charters, I. 783, 786.

[2] New York Colonial Documents, Vol. III. p. 331; also, Proceedings of the Legistative Council of New York, Hist. Intro.

name of a "charter of liberty," vested the government in the hands of a governor, council, and representative assembly, with powers similar to those possessed by the corresponding branches in New England; and these enactments were approved, not only by the governor and the duke, but also by the king.[1]

The somewhat crooked line which marks the growth of the colonial constitution of New Jersey may be traced through the following facts: (1) The grant of the territory in 1664 to Berkeley and Carteret, with all the rights and powers of government; (2) the "concession" or constitution of government granted in 1665 to the people by these proprietors; (3) the concession granted by Carteret in 1676 to East Jersey, after the division of the province; (4) the constitution bestowed in 1681 upon West Jersey by the several joint proprietors who had acquired, by purchase, that portion of the province; and (5) the royal commission of 1702, which established a new government after the reunion of the two provinces into one.[2] In all these changes of authority, the form of government established by the above-mentioned laws, of whatever name, retained the general form which already prevailed in New England, which type was more consciously followed than that of the South, although there was no essential difference between the political forms of the two sections.

The constitution of Pennsylvania grew up as the result of: (1) the charter granted to William Penn in 1681, which gave the proprietor full legislative authority over the province; and (2) the "frame of government," so called, granted by Penn in 1682, which established a political organization similar in its outlines to those already described. This "frame" was renewed with slight modification in 1683 and also in 1696. These successive frames of government defined the several branches by provisions more minute than those found in any previous enactment

[1] New York Laws (old edition), Vol. II., Appendix, cited by Story.
[2] Grahame's Colonial History, Vol. II. bk. 6.

and which seem to anticipate in some respects the later constitutions.[1] For example, a greater dignity was given to the council by extending the period of its membership and by introducing into it the principle of elective rotation, like that afterward embodied in the United States Senate. An examination of the various constitutional enactments of the time will, I believe, convince one that no man of the early colonial period, notwithstanding the troubles of his later life, showed a greater degree of political sagacity or a higher genius for constructive statesmanship than that shown by the Quaker proprietor of Pennsylvania. His constitutional laws, which were unquestionably the most original of his time, stand out in marked contrast to the impractical political devices of his contemporary, John Locke. They were based upon the simple constitutional forms already found to be of service in the other colonies, and were skilfully adjusted in detail to the actual condition, social and religious, of the people under his authority.

With regard to Delaware it need simply be said that, although allowed a separate assembly, it retained the same governor as Pennsylvania, and was considered under the same constitution as that province until the Revolution.

As the middle colonies adhered closely to the New England model, and as the political forms of New England were derived from the same source as those of the South, we consequently find one general type prevailing throughout all the English colonies in America. This general type was, as we have seen, characterized by three essential features: (1) a governor, with a deputy-governor, who possessed chief executive authority; (2) a council of magistrates, which acted as an advisory body to the governor, and which in connection with the governor exercised judicial functions; (3) an assembly of freemen, either primary or representative, which in connection with the governor and

[1] Poore's Charters, II. 1509, *et seq.*

council possessed the powers of legislation. The subsequent political changes, which resulted in the modifications of this primitive type and which were embodied in the later state constitutions, and the extent to which these changes were due to English influences, have been as far as possible excluded from this discussion.

The first point which I have tried to illustrate in this rapid sketch of the genesis of the American colonial constitutions is the fact that the original frame of government which they established was, in no proper sense, patterned after the structural features of the English government; but that it was merely a reproduction or continuation of the government established by charter for the colonial trading companies, as seen in the East India Company and in the London Company under its third charter, and in the Massachusetts Bay Company.

The second and more important point which I have sought to emphasize is the fact that the colonial constitutions, the establishment of which marks the first stage in the growth of American constitutional law, were developed, not as the result of custom, but as the product of statutory legislation. The political organization of every colony was sanctioned by a written constitution. The fact that these constitutions were not enacted by the people in no way invalidates their character as constitutional law. It was only by the Revolution that the sovereign authority of the people was recognized. Previous to that event the only ultimate source of legal authority within the English dominions was the king and Parliament. Every enactment, whether relating to the public weal or to private interests, which could properly have the character of positive law, must be established, either directly or indirectly, by the sovereign power of the English nation. It is this very fact, namely, that the colonies, like their prototypes, the trading companies, were not independent communities, but subordinate corporate bodies, which explains the reason why in every case written laws were necessary to define

their special privileges and franchise. Not organized under any general law each must derive its powers from an express charter, or written grant. Every power which the trading company could exercise must be derived from the express terms of its charter, which was the instrument of its creation. In the same way, the colony, whether organized directly under a charter, like Massachusetts, or indirectly under a company having chartered powers, like Virginia, could exercise only those functions which were defined by the terms of an express grant.

This conception of the colony, as a subordinate body-politic, derived from or allied to the trading company, capable of assuming powers and privileges only so far as delegated by an express grant, explains the origin of the written constitutions which prevailed in all the American colonies. And the fact that the colonists themselves recognized their constitutional grants as the exclusive source of their political powers and privileges also explains the tenacity with which they clung to their charters, and the almost sacred veneration with which they cherished their written constitutional laws. The worship of a written constitution, which has sometimes been satirized as a sentiment peculiar to the American people, has its explanation in the fact that the genesis and growth of political liberty in this country, whether considered in the early colonial period which we have described, or in the later national period, have taken place in great measure within what may be called the sphere of written law.

WILLIAM C. MOREY.

University of Rochester.